(3)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL RICHARDS
Petitioner,

v.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY,
Respondents.

On Petition For Writ of Certiorari
To The Texas 10th Circuit Court of Appeals

APPENDIX VOLUME II

Gaines West
Counsel of Record
WEST, WEBB, ALLBRITTON & GENTRY, P.C.
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile
Counsel for Petitioner

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

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APPENDIX E

IN THE
TENTH COURT OF APPEALS

No. 10-01-183-CV

MICHAEL RICHARDS,
Appellant

v.

TEXAS A & M UNIVERSITY SYSTEM
AND TEXAS A & M UNIVERSITY,
Appellees

From the 361st District Court
Brazos County, Texas
Trial Court # 47,822-361

OPINION

This is an appeal of an order dismissing a suit for want of jurisdiction. We state the facts largely as they appear in the pleedmgs of Michael Richards, appellant here and plaintiff in the trial court. For several years, Richards was employed as a maintenance worker by Texas A&M University System and Texas A&M University (collectively _TAMU"), appellees here end defendants in the trial court.

While so employed, Rtchards suffered injuries to his back and other injuries. After Richards filed a workers' compensation claim, TAMU terminated Richards's employment, Alleging that TAMU had terminated him in retailation for his Workers' compensation claim, Richards brought suit against TAMU under the "Anti-retailiation Law ". *See* TEX. LAB. CODE. ANN. chap. 451. (Vernon 1996). TAMU moved for dismissal, on the ground that they are immune from suit under the doctrine of sovereign immmunity. The trial court granted the motion and ordered the suit dismissed. Richards appeals. Richards presents an equal-protection challenge to the constitutionality of the Texas Workers' Compensation Act's. waiver, of governmental immunity for employees of some state educational institutions, but not for employees of other state institutions, agencies, and political subdivisions. *See Id.* tit. 5 (Vernon 1996 & Supp. 2004). This Opinion thus involves issues of constitutional law. *See* TEX. R. APP. 47.4 (b). We will affirm:

PRESERVATION

In the firstplace, TAMU contends that Richards did not preserve, his constitutional complaint for appellate review. TAMU argues Richards did not timely, affirmatively plead a constitutional claim in his petition and pray for injunctive relief. Richards was not required to seek injunctive relief in order to raise equal protection as a defense to TAMU's motion to dismiss, and need not have raised it until TAMU filed their motion.

Richards filed his original petition and his amended petition in 1998. In their answer, TAMU raised sovereign immunity as an affirmative defense to suit and to liability.

In 1999 and again in 2000, the trial court gave the parties notice of its intent to dismiss the suit for want of prosecution, time, Richards moved to retain the case on the court's docket, on the ground that the Texas Supreme Court's then-pending decision in *Kerrville State Hospital v. Fernandez* would settle the question of whether the State had waived sovereign immunity for suits by state employees under the Anti-Retaliation Law. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000). Each time, the court ordered the case retained.

In July, 2000, the Supreme Court decided *Kerrville State Hospital, id.* The Court held that the predecessor of Labor Code Section 501.002 waived sovereign immunity for anti-retaliation actions against state agencies covered by that law, *See id*, at 4-8.

In September, 2000, TAMU filed their motion to dismiss for want of jurisdiction, The motion contended that the State had not waived soveign immunity for suits by TAMU employees under the Anti-Retaliation Law, that TAMU were thus immune from Richards's suit, and that accordingly the trial court lacked subject-matter jurisdiction.

In February, 2001, Richards filed a response, loosely framing an-equal-protection argument. The next month, Richards filed a supplemental response, in which he expressly presents arguments under the equal-protection clauses of the United States and Texas Constitutions.

In May, 2001, the trial court granted TAIVIU's motion to dismiss. The court noted:

> This Court cannot comprehend why the Legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas [T]ech system) while draying that same coverage to those employees of the A&M and UT systems. There is no logical basis for the distinction.

Nonetheless, the court expressly overruled Riehards's equal-protection argument.

The next day, Richards filed a motion for reconsideration of the court's order, again urging that the Workers' Compensation Act irrationally and therefore unconstitutionally discriminated against employees of TAMU.

It is true, as TAMU argue, that Texas common law does not recognize a cause of action in tort for money damages for a violation of the Texas Constitution. *See City of Beamont Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995). Richards, however, manifestly seeks damages under the Anti-Retaliation Law, a statutory cause of action, and not under the Texas Constitution.

Richards's constitutional argument, too, is timely. The Texas Rules of Appellate Procedure require a "timely" complaint in the trial court in order to preserve the complaint for appeal.TEX. R. APP. P. 33.1(a). In order to be timely, a complaint must be raised at a time when the trial court has the power and opportunity to correct the error alleged. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999). An objection is timely if made "as soon as the ground of objection becomes apparent." *Kerr McGee*

Corp. v. Helton, No. 07-01-0263-CV, 2002 Tex. App. LEXIS 566, at *8 (Tex. App.–Amarillo Jan. 28, 2002), *rev'd on other grounds,* 47 Tex.Sup.Ct. J. 248, 2004 Tex. LEXIS 63 (Tex. Jan. 30, 2004); *accord Aguilar v. State*, 26 S.W.3d 901, 905-906 (Tex.Crim. App. 2000). Richards need not have raised equal protection as a defense to TAMU's assertion of sovereign immunity before TAMU filed their motion to dismiss asserting immunity from suit. After TAMU filed their motion to dismiss, and before the court ruled on the motion, Richards filed responses raising the denial-of-equal-protection complaint. After the trial court granted TAMU's motion, Richards filed a motion for reconsideration, again arguing equal protection. Richards thus timely and specifically presented his equal-protection complaint to the trial court. This issue is adequately preserved.

LEGAL BACKGROUND

Sovereign Immunity

The doctrine of sovereign immunity, of course, predates the United States Constitution. *See Alden v. Maine*, 527 U.S. 706, 711-30 (1999). As a matter of natural law or the law of nations, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" *Id.* at 716 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (emphasis in THE FEDERALIST). A. "Sovereign[] is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). The states are sovereigns for purposes of sovereign immunity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S.

743, 751-53 (2002). As the Texas Supreme Court has put it, "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003)(quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. "[M]ore concretely," however, state sovereign immunity protects against "raids on state treasuries." *Alden*, 527 U.S. at 720.

In Texas, sovereign immunity, unless waived, includes immunity from suit and immunity from liability. *Wichita Falls State Hosp.*, 106 S.W.3d at 696. In the absence of waiver of immunity from suit, a trial court lacks subject-matter jurisdiction in a suit against the State. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

Equal Protection

Riehards argues for relief under the equal-protection provisions of the United Sates and Texas Constitutions.

The Equal Protection Clause of the United States Constitution provides:

> No State shall... deny to any person within its Jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. "[T]he Equal Protection Clause 'is essentially a direction that all persons similarly

situated should be treated alike[.]' " *Nguyen v. Immigration & Naturalization Serv*, 533 U.S. 53, 63 (2001) (quoing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

The Bill of Rights of the Texas Constitution provides for equal protection in the following terms:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. art. I, § 3.

Texas ceurts have generally assumed that an equal-protection analysis can be applied to the issue of the waiver of sovereign immunity. *E.g., Tex. Dep't of Health v. Rocha*, 102 S.W.3d 348, 355 (Tex. App.–Corpus Christi 2003, no pet.) (TEX.CONST.); *Gulf Electroquip, Inc. v. Univ. of Tex. at Austin*, No. 14-00-01149-CV, 2002 Tex. App. LEXIS 2313, at *11-*12 (Tex. App.–Houston [14st Dist.] Mar. 28, 2002, pet. denied) (not designated for publication) (U.S. CONST.). The highest court of at least one state has held that the waiver of sovereign immunity cannot violate the Equal Protection Clause. *See Riddle v. Ashe*, 495 S.E.2d 287, 288-89 (Ca. 1998). In that case, reasoning that since the Equal Protection Clause "protects only rights, not mere privileges," and since "[a] waiver of sovereign immunity is a mere privilege, not a right, and the extension of that privilege is solely a matter of legislative grace, " the Court concluded that "discrimination in the grant of privileges is not a denial of equal protection to those who are not favored." *Id.* We

assume without deciding that the waiver of sovereign immunity may be analyzed under equal-protection standards.

The equal-protection analysis under the federal Equal Protection Clause "applies to equal protection challenges under the Texas Constitution." *Bell v. Low Income Women*, 95. S.W.3d 253,266 (Tex. 2002).

Under that analysis, social and economic legislation that does not discriminate against a protected class or implicate a fundamental right is evaluated on a rational-basis standard. *See Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127-28 (1999) (per curiam). Such legislation includes workers' compensation legislation. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 524 (Tex. 1995). "Under rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) (quoting *City of Cleburne*, 473 U.S. at 441). "Such a classification cannot run afoul of the Equal Protection Clause if there is a ratioual relationship between the disparity of treatment and some legitimate governmental purpose. " *Id.* at 367. That is, legislation survives an equal-protection challenge so long as the legislation is "rationally related to a legitimate state interest." *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). A state interest is legitimate so long as it does not "run afoul of some specific federal constitutional prohibition, or of some valid federal law." *See Lincoln Fed. Labor Union v. N. W. Iron & Metal Co.*, 335 U.S 525, 536 (1949).

Government employees are not a protected class for equal-protection proposes. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976).

As a matter of separation of powers, the judicial branch presumes that the actions of the legislative branch are constitutional. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The legislative Record need not show the legislature's reasons. *Garrett*, 531 U.S. at 367. Rather, the party challenging constitutionality of legislation has the burden "to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993))(internal quotation omitted). The rational basis conceived of by the reviewing court need not be the one that actually motivated the legislature. *See Fed. Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). For example, In *Williamson v. Lee Optical of Oklahoma, Inc.*, the United State Supreme Court hypothesized reasons for a statute that permitted ophthalmologists and optometrists, but not opticians, to fit or duplicate eyeglass lenses. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 485-86, 487, 490-91 (1955).

Texas Workers' Cempensation Act

The Workers' Compensation Act, of course, creates a comprehensive insurance system for workplace injuries to employees of subscribing employers. See TEX. LAB. CODE ANN. tit, 5. The Act's social and economic purposes include simplifying and rationalizing compensation to employees for workplace injuries, and limiting tort liability for employers.

See Payne v. Galen Hosp. Corp., 28 S.W.3d 15, 17 (Tex. 2000); *Garcia*, 893 S.W.2d at 510-16.

The Act generally provides for coverage for employees of the State of Texas and of Texas state agencies, that is, for persons "in the service of the state pursuant to an ... express oral or written contract of hire." TEX. LAB. CODE ANN. § 501.001(5)(A) (Vernon Supp. 2004); *see id.* § 501.021 (Vernon 1996). Within this general provision for state employees, the Act expressly includes employees of Texas Tech University, of Texas Tech University Health Sciences Center, and of institutions under the boards of regents of those institutions. *Id.* § 501.022(a) (Vernon 1996). The Act also separately provides for coverage for employees of political subdivisions of the state. *Id.* § 504.011 (Vernon 1996).

From this general coverage of state employees, however, the Act excepts the employees of three state agencies, to the extent that those employees are covered by other sections of the Act: the University of Texas System, the Texas A&M University System, and the Texas Department of Transportation. TEX. LAB. CODE ANN. § 501.024(5)-(7) (Vernon Supp. 2004). Other provisions of the Act specifically provide for coverage of employees of these agencies. *See id.* § 502.021(a) (Vernon 1996) (Tex. A&M Univ. Sys.); *id.* § 503.021(a) (Vernon 1996) (Univ. of Tex. Sys.); *id.* § 505.011 (Vernon 1996) (Tex. Dep't of Transp.).

In specifically providing for coverage for employees of these three agencies, those subchapters generally adopt definitional and other sections of the Act, modifying them as necessary, to the extent that the general sections are not

inconsistent with the specific subchapters. TEX. LAB. CODE ANN. §§ 502.002, 503.002, 505.002 (Vernon 1996). The subchapters providing for coverage for state employees generally and those spccifically providing for coverage of employees of political subdivisions and the Department of Transportation expressly adopt Chapter 451, the Anti-Retaliation Law. *See id.* §§ 501.002(a)(10), 504.002(a)(7)(Vernon Supp. 2004); *id.* § 505.002(a)(10) (Vernon,1996). The subchapters providing for coverage for employees of the A&M System and the UT System do not adopt Chapter 451. *Cf. id.* §§ 502.002(a), 503.002(a).

Anti-Retaliation Law

Chapter 451 of the Texas Labor Code, commonly called the Anti-Retaliation Law, provides, "A person may not discherge or in any other manner discriminate against an employee because the employee has... filed a workers' compensation claim in good faith" or otherwise participated in a workers' compensation claim or suit in specified ways. TEX. LAB. CODE ANN. § 451.001; *see Kerrville State Hosp.*, 28 S.W. 3d at 4 & n.l. The purpose of the Law is "to protect. persons who are entitled to benefits under the Worker's Compensation Act and to prevent there from being discharged for filing claims to collect such benefits," *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997) (per curiam). The Law is thus a statutory exception to the common-law employment-at-will doctrine. *Alayon v. Delta Air Lines, Inc.*, 59 S.W.3d 283,287 (Tex. App.–Waco 2001, pet. denied).

The Anti-Retaliation Law expressly waives sovereign immunity from suit by employees of those agencies to

which the Law applies. *See Kerrville State Hosp.*, 28 S.W.3d at 9 (state employees under TEX. LAB. CODE chap. 501); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 296 (Tex. 1995) (employees of political subdivisions under TEX. LAB. CODE chap. 504).

ANALYSIS

Richards does not contend that the review of the Workers' Compensation Act is under any heightened scrutiny. Nor does Richards contest that the Legislature did not intend to waive sovereign immunity for employees of the UT and A&M systems. The only contested matter is whether, in not waiving immunity for those employees, while waiving it for state employees generally, the Legislature denied Richards equal protection. It did not.

Richards argues that TAMU fail to state a rational basis for the distinction betweem the two educational institutions and other state agencies. Richards thus misstates the parties' burdens. The argument of TAMU, both at trial and on appeal, would have been more helpful had they developed speeific reasons, grounded in the lagislative history, for the Legislature's drawing the distinction that it did. Nonetheless, the burden to overcome the strong presumption in favor of the constitutionality of a statute, both at trial and on appeal, rests on the party challenging the statute. Thus, the burden remains on Richards to demonstrate that under no conceivable state of facts is the distinction rational.

Likewise, Richards puts great weight on the trial court's statement that there was no "logical" reason for the distinction between these two educational institutions and

other state agencies. Trial court findings have little effect on the review of the constitutionality of a statute. *Garcia*, 893 S.W.2d at 519-20. Again, on appeal, as at trial, Richards bears the burden of establishing that no rational basis for the distinction exists. Since we can conceive of a rational basis, Richards fails to meet this burden.

We must hold a statute constitutional against an equal-protection challenge unless we can conceive of no rational basis for the distinction drawn by the statute. The Texas Supreme Court has upheld the Workers Compensation Act against general equal-protection challenges: *Garcia*, 893 S.W.2d at 525, 531, 532, 533. The Eastland Court of Appeals, too, has held that the UT System's retention of sovereign immunity against anti-retaliation suits, under circumstances corresponding to the A&M System's, did not deny UT System employees equal protection. *See Clark v. Univ. of Tex. Health Science Ctr.*, 919 S.W.2d 185, 188 (Tex. App.–Eastland 1996, writ denied).

Only One rational basis for the difference in protection is needed. We have identified at least one possible rational basis for this distinction. The A&M and UT systems are the only state educational institutions for whose employees the State has not waived sovereign immunity from suit under the Anti-Retaliation Law. Those institutions also share the distinction of being the only state educational institutions that are authorized to meet their workers' compensation obligations by self-insurance. *See* TEX. LAB. CODE ANN. §§ 502.022, 503.022 (Vernon 1996). The distinction between insured and self-insuring entities can constitute a valid rational basis for a distinction between them. For example, the Supreme Court of Mississippi has held that a statute that

waived sovereign immunity for municipalities that participated in an insurance plan, but did not waive it for municipalities that self-insured, did not deny equal protection. *Mosby v. Moore,* 95-CA-00672-SCT, ¶¶ 17-21 (Miss. 1998), 716 So.2d 551; 555-56.

The costs of workers' compensation, insuran_ claims and suits can be high and unpredictable.. A self-insuring entity, of course, does not enjoy the primary benefits of insurance which are to limit the entity's exposure by distributing liability over many insureds. Cf. Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985). The Legislature may have believed that it was necessary to protect the A&M and UT systems from the additional risks and burdens of potentially large anti-retaliation lawsuits. Although we have no reason to believe that those institutions discharge employees for filing workers' componsation claims or suits, the costs of defending against or settling employment suits, even suits that the defendant believes are groundless, can be substantial. Richards, for instance, pleaded for damages for lost income, lost earning capacity, past and future mental anguish, and loss of enjoyment of life, for punitive damages, and for attorney's fees. The A&M and UT systems' liability as workers' compensation self-insurers distinguishes them from other state educational institutions, for whose employees the State has waived sovereign immunity for anti-retaliation suits.

Richards argues that the conservation of the State's limited financial resources cannot be a rational basis for the decision not to waive sovereign immunity. To the contrary, "to protect the public treasury" is one of the prime reasons for modern sovereign immunity. *Wichita Falls State Hosp.*, 106 S.W.3d at 695. In detertmining the political question of

whether to waive immunity, the Legislature's chief difficulty is to balance the equitable considerations favoring waiver against the fiscal considerations warning against waiver. In connection with sovereign immunity, the Legislature has stated its "interest in managing state fiscal matters through the appropriations process." TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004). The Supreme Court has also acknowledged "the Legislature's interest in protecting the State's financial resources." *Wichita Falls State Hosp.* at 701. This interest arises from the fact that "[subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward lawsuits and paying judgments." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.2d 849, 854 (Tex. 2002) (plurality op.). Thus, even "when waiving immunity ... the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors." *Wichita Falls State Hosp.* at 698. In this situation the Legislature provided employees with certain benefits under the workers' compensation system but did not waive immunity for suit under the anti-retaliation provisions of the Workers' Compensation Act.

Limiting the potential liability of TAMU, which can self-insure for workers' compensation coverage, would be a proper consideration in deciding whether to waive sovereign immunity Accordingly, the determination not to waive sovereign immunity for anti-retaliation suits against TAMU, while waiving it for other state agencies, would have a

rational basis. Thus, we overrule Richards's issue.[1]

---

[1] We respond briefly to the concurding opinion. To the extent that the concuring opinion states that Richard's "complaint should be addressed to the " Legislature, we heartily agree. "[T]he Legislature is better suited to balance the conflicting policy issues associated with waiving immunity" than are courts. *Wichita Falls State Hosp.*, 106 S.W.3d at 695. To the extent, however, that the concurring opinion concludes that we have no power to grant Richards relief, had we found harmful error, we cannot agree. "In Texas, the bar of sovereign immunity is a creature of the common law and not of any legislative enactment." Tex. A&M Univ.-Kingsville v. Lawson, 87 S.W.3¢I 518, 520 (Tex. 2002) (plurality op.) (citing *Hosner*, I Tex, at 769). "Historically," courts "have left to the Legislature whether to waive sovereign immunity." *Id.* at 520 (quoting Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 595 (Tex. 2001)). The policy reasons for deferring the political question of the waiver of sovereign immunity to the Legislature are weighty, and they are sound. *See Fed. sign v. Tex. S. Univ.*, 951 S.W.2d 401, 413-15 (Tex. 1997) (Hecht, J., concurring). But the Supreme Court has "not absolutely foreclosed the possibility that thejudiciary may abrogate immunity by modifying the common law," *Wichita Falls State Hosp*, at 696. We cannot confidently conclude that in no case of a serious deprivation of constitutional rights, would other considerations outweigh the policy reasons in favor of deference to the Legislature.

CONCLUSION

Having overruled Richard's sole issue, we affirm thhe trial court's judgment.

TOM GRAY
Chief Justice

Before Chief lustice Gray,
Justice Vance, and
Justice Rcyna[2]
(Justice Vance concurring)
Affirmed
Opinion delivered and filed February 11, 2004
[CVo6]

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2 This case was submitted with former Chief Justice Davis on the panel, but he resigned effective August 4, 2003. Justice Reyna, who took the oath of office on January 5, 2004, participated in the decision of the Court.

IN THE
TENTH COURT OF APPEALS

No. 10-01-183-CV

MICHAEL RICHARDS,

Appellant

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TEXAS A& M UNIVERSITY SYSTEM
AND TEXAS A & M UNIVERSITY,

Appellees

From the 36ist District Court
Brazos County, Texas
Trial Court # 47,822-361

CONCURRING OPINION

Richards essentially argues that the absence of a statute waiving sovereign immunity as to A&M amounts to a denial of equal protection because the legislature has waived sovereign immunity for workers' compensation retaliation suits under Texas Labor Code Chapter 451, for all state agencies other than the University of Texas and Texas A&M University. "I agree to affirm the trial court's judgment of dismissal for want of jurisdiction.

SOVEREIGN IMMUNITY

It is axiomatic that sovereign immunity protects the State of Texas, its agencies and its officials from lawsuits for damages absent legislative consent to sue the State. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401,405 (Tex. 1997).

Richards asks us to do something we cannot do: write a statute that waives sovereign immunity for employees of A&M who want to sue for wrongful discharge after filing a compensation claim. *See Lynch v. Port of Houston Auth.* 671 S.W.2d 954, 957 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("Such a drastic and fundamental change [as to abrogate the doctrine of sovereign immunity] should be made, if at all, by the legislature or the Supreme Court."); *see also Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (Scalia, L concurring) ("[T]he Court has no power to provide the relief requested.").

Richards' complaint should bo addressed to the legislature. Bocause the legislature has not abrogated sovereign immunity in this context and the Supreme Court has not addressed it, it remains intact.[1] The trial court's dismissal was correct.

BILL VANCE
Justice

Concurring opinion delivered and filed February 11, 2004

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[1] Thus, the appropriate rationale is found in footnote 1 of the majority's opinion, recognizing that Texas courts have not waived sovereign immunity. That being the case, a discussionn of thhe merits of thhe equal protectionn argument is immaterial.

APPENDIX F

NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY
APPELLEES

Received FEB 26 2004

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Brazos County, Texas
Cause No. 47,822-361

APPELLANT'S MOTION FOR REHEARING

WEST, WEBB, ALLBRITTON,
GENTRY& R/FE, P.C.
Gaines West
State Bar No. 21197500
Alan M. Bush
State Bar No. 24040614
1515 Emerald Plaza
College Station, Texas 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

ATTORNEYS FOR APPELLANT

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APPELLANT'S MOTION FOR REHEARING

WEST, WEBB, ALLBRITTON,
GENTRY& R/FE, P.C.
Gaines West
State Bar No. 21197500
Alan M. Bush
State Bar No. 24040614
1515 Emerald Plaza
College Station, Texas 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

ATTORNEYS FOR APPELLANT

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TEX. LAOR CODE §§ 502.070 -502.070;
§§ 503.001-503.07 3,6,7

ISSUES PRESENTED

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as declared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employees of the University of Texas A&M and the University of Texas Systems?

III. Do Chapters 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose?

ARGUMENT AND AUTHORITIES

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

Courts have long recognized that not all state purposes are legitimate, [1] Limits on legitimate state purposes are critical, because the very purpose of the Equal Protection Clause is to protect from "arbitrary " distinctions in the law, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Avery v. Midland County*, 390 U.S. 474, 484 (1968). If courts were blind to the capriciousness of certain legislative purposes, then the Equal Protection clause would be empty. The United States Supreme Court, however, has recognized some boundaries beyond which a state legislature's purpose is no longer legitimate. *Day-Brite Lighting, Ihe. v. Missouri*, 342 U.S. 421,423 (1952). Specifically, a state purpose is not legitimate if that purpose violates a constitutional provision or conflicts with federal law. *Id.*

Besides the boundaries recognized by the United States Supreme Court, the legislature's purpose is illegitimate when that purpose violates a legislatively announced public policy. If a state could violate its own public policy, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law. *Olech*,

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[1] Texas courts look to the federal courts for guidance in interpreting the Equal Protection Clause of the Texas Constitution, because similar factors are involved in both provisimas. *See e.g. Whitworth v. Bynum*, 699 S.W.2d 194, 197 n.5 (Tex. 1985) (discussing Tex. Const. art, I, § 3).

528 U.S. at 564; *Avery*, 390 U.S. at 484. For example, the State of Texas could choose to save money by excepting the Texas A&M and University of Texas ("A&M & UT") Systems from the Texas Whistlebiower Act, TEX. GOV'T CODE § 554.001, El seq. If this were the case, if an employee of the A&M or UT Systems reported an illegal activity, the A&M and UT Systems could retaliate against a reporting employee by firing the employee, and the employee would have no remedy despite the Whistleblower Act's legislatively approved public policy of preventing such retaliation. Clearly in this example, the state legislature's purpose would be arbitrary, even if the legislature's purpose did not contravene the constitution or a federal statute.

The Texas Whistleblower Act's goal in protecting reporting employees from retaliation is analogous to the case at bar. As pointed out above, in the example cited, it is the retaliation for making such a report that is protected. Without the protection against such retaliation, an employee would likely be hesitant to make a Whistleblower report, and some reports would, of course, not be made at all. If our legislature dared to exempt A&M and UT System employees from the Texas Whistleblower Act's protections because it would save the State of Texas money, which it most certainly would, there would be a great outcry because there simply is no legitimate purpose for such a distinction between similarly situated employees. While money could and would be saved by failing to protect all such employees from such retaliation, there is no rational support for such an illegitimate distinction. The legislature's power to distinguish between similarly situated employees is not unbridled. Any effort by the legislature to make distinctions between similarly situated employees must not only have a basis, but that

result must be a rational basis founded in a legitimate purpose.

The Equal Protection Clause clearly imposes limits on the "legitimate purposes" a state can claim to justify treating similarly situated employees differently. This Court can not give legitimacy to a legislative purpose that illegitimately violates a public policy that has been announced by the state legislature. In the case at bar, just like in the Whistleblower example above, without the protection against retaliation for filing a workers' compensation claim, claims will go unreported for fear the employee will lose his or her job. There is no legitimate purpose behind a legislative attempt to deny protection to A&M and UT System employees from retaliation for filing for workers' compensation benefits.

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as deelared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employees of the University of Texas A&M and the University of Texas Systems?

The Texas legislature has given all public and private employees a remedy when their employer retaliates against them for filing a workers' compensation claim. But the legislature has denied that remedy to employees of the A&M and UT Systems. TEX. LABOR CODE §§ 502.070 - 502.070; §§ 503.001 - 503.071. To justify the legislature's distinction, this Court identified a single legitimate state purpose-to save the

state money. 2 **Appendix A, p. 12-13.**

The fact remains that this state purpose, saving the state money, violates the public policy of Texas, as atmounced by the state legislature in the Texas Workers' Compensation Act. § 401.001 El. seq. The Act's overarching purpose is to ensure that employees who are injured on the job receive prompt remuneration. *Paradissis v. Royal Indemnity Co.*, 507 S.W.2d 526, 529 (Tex. 1974). In most cases, the Act is an injured employee's exclusive remedy for work-related injuries. § 408.001 (a). Given that an employee often has a remedy only under the Act, the legislature recognized that employers could escape workers' compensation liability by retaliating harshly against employees who filed workers' compensation claims, because workers would be discouraged from pursuing claims. *See Trico Technologies, Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362, 367 (Tex. App.-El Paso 2002, no pet.). Thus, the legislature has declared that the anti-retaliation provisions of the Act are critical to supporting the public policy of providing injured workers with prompt remuneration.

Stripped of the Act's protections against retaliation, employees of the A&M and LIT Systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation china. This fear of

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[2] Curiously, this Court doubts whether A&M fires its employees for filing workers' compensation claims. **Appendix A. p. 13.** But the Court will never know ifA&M retaliates against its employees, so long as the Court refuses to allow Richards to go forward with his case!

retaliation will create a chilling effect, as fewer and fewer workers take advantage of the prompt remuneration provided by workers' compensation. If one worker chooses to suffer with untreated and/or uncompensated injuries rather than risk losing his or her job for filing a claim, that is one worker too many. Indeed, a right unprotected is no right at all. Because of this Court's ruling, the UT and A&M Systems may, in effect, save the state some money because their employees will not want to risk filing workers' compensation claims and risk losing their jobs. The Texas Legislature's scheme to deny employees at their flagship institutions the protection against retaliation for filing workers' compensation claims may be a money maker for our State, but the cost of "saving" this money is too high and has no legitimate purpose.

This Court has found that saving money is our legislature's sole rational basis for excluding A&M and UT System employees from the anti-retaliation protection of the Workers' Compensation Act. But, in this limited context, Richards contends that saving money is not a legitimate legislative purpose. The Equal Protection Clause can not be interpreted to allow A&M and UT System employees to be stripped of their right to be protected when filing workers' compensation claims, while all other private and public employees enjoy this protection. If the Court idly stands by today, and fails to recognize this complained of action as being an illegitimate purpose, what other arbitrary violations of public policy will the Court tolerate? It is not too far a stretch of the imagination to think that, in the example cited herein, the legislature might next abrogate the rights of A&M and UT System employees by taking away their right to be protected from retaliation when making Whistleblower reports. A legislature's power to make such arbitrary

distinctions between similarly situated employees is not unbridled. The Equal Protection Clause does not require that there be just "some basis" for a distinction between similarly situated employees, but that the distinction is a"rational basis" supported by a legitimate purpose. The legislature has no legitimate purpose here because violating state policy, as created by the legislature, can never be a legitimate purpose to support such a distinction.

The Court cites *Clark v. Univ. of Tex. Health Science Ctr.*, 919 S.W.2d 185, 188 (Tex. App. - Eastland 1996, writ denied) in an effort to follow its sister Court which upheld Chapter 503 from an Equal Protection challenge. **Appendix A**, p. 12. However, the Eastland Court's decision is bad law, While citing the Equal Protection Clause, the Eastland Court applied a Due Process analysis. Specifically, the Eastland Court held that *Clark* did not have a property interest, *Id.* at 188. However, lack of a property interest is relevant to a Procedural Due Process analysis, not an Equal Protection Clause analysis. *Am. Mfr. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59 (1999). This Court should not rely on an opinion that misses the point and uses a flawed analysis in reaching its opinion.

The legislature's purpose of saving money by denying A&M and UT System employees from making claims of retaliation for being fired after filing a workers' compensation claim violates the public policy announced in the Act. The policy of the Workers' Compensation Act is to provide injured employees with prompt remuneration. *See Paradissis*, 507 S.W.2d at 529. Accordingly, this Court should refuse to recognize that saving the state money alone is a legitimate state interest and rational basis to deny

workers at A&M and UT the protections given to all other workers in the State of Texas.

III. Do Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose?

Under the United States and Texas Constitutions, a state statute survives rational basis scrutiny only when the statute is rationally related to a legitimate state purpose. *Board of Trustees of the University ofAlabama v. Garrett*, 531 U.S. 356, 367 (2001); Whitworth, 699 S.W.2d at 197. Here, the Appellees have failed to articulate a legitimate state purpose, because saving the state money is not a legitimate purpose as detailed herein. Therefore, Chapters 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions.

PRAYER

Michael Richards respectfully requests that this Court reconsider its panel decision issued on February 11, 2004. Appendix A. Specifically, Richards requests that this Court reverse the trial court and find that Chapters 502 and 503 of the Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because they fail to provide protection against retaliation for filing a workers' compensation claim, a protection granted all other State employees. Richards further asks sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings that are consistent with this Court's opinion.

Respectfully Submitted,

WEST, WEBB, ALLBRITTON,
GENTRY& R/FE, P.C.

By: /s/ Gaines West

Gaines West
State Bar No. 21197500
Alan M. Bush
State Bar No. 24040614
1515 Emerald Plaza
College Station, Texas 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copyof the foregoing document has been sent by overnight delivery to the following on this the 26th day of February 2004.

Brad McClellan
ASSISTANT ATTORNEY GENERAL
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

CERTIFICATE OF CONFERENCE

Counsel for Appellant has contacted counsel for Appellees regarding the filing of this motion. Counsel for Appellees opposes the filing of this motion.

/s/ Gaines West
Gaines West

APPENDIX G

TENTH COURT OF APPEALS

McLerman County Courthouse
501 Washington Avenue, Rm 415
Waco, Texas 76701-1327
Phone: (254) 757-5200 Fax: (254) 757-2822

Chief Justice
Tom Gray

Clerk
Sharri Roessler

Justices
Bill Vance
Felipe Reyna

March 10, 2004

Gaines F. West II
West Webb Allbritton
Gentry & Rife Pc
1515 Emerald Plaza
College Station, TX 77845

Bradley D. McClellan
Assistant Attorney General
Tort Litigation Division
P.O. Box 12548
Austin, TX 78711

Shannon L. Simmons
Assistant Attorney General
Tort Litigation Division
PO Box 12548
Austin, TX 78711

RE: Court of Appeals Number: 10-01-00183-CV
Trial Court Case Number: 47,822-361

STYLE: Michael Richards
v.
Texas A&M University System
and Texas A&M University

Appellant's motion for rehearing was denied today.

Justice Vance would grant rehearing and issue the concurring opinion as that of the court.

Sincerely,
Sharri Roessler, Clerk

/s/ Nell Hegefeld
By: Nell Hegefeld,
Deputy Clerk

APPENDIX H

NO. 10-01-183-CV

IN THE SUPREME COURT
OF TEXAS

MICHAEL RICHARDS
PETITIONER

V.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY
RESPONDENTS

COPY

On Appeal from the 361st Judicial District Court
Brazos County, Texas
Cause No. 47,822-361

PETITION FOR REVIEW

WEST, WEBB, ALLBRITTON,
& GENTRY, P.C.
Gaines West
State Bar No. 21197500
Alan M. Bush
State Bar No. 24040614
1515 Emerald Plaza
College Station, Texas 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

ATTORNEYS FOR PETITIONER

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WEST, WEBB, ALLBRITTON,
& GENTRY, P.C.
Gaines West
State Bar No. 21197500
Alan M. Bush
State Bar No. 24040614
1515 Emerald Plaza
College Station, Texas 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

ATTORNEYS FOR PETITIONER

IDENTITY OF PARTIES AND COUNSEL

PARTIES	COUNSEL
Petitioner	
Michael Richards	Gaines West Alan M. Bush West, Webb; Allbritton & Gentry, P.C: 1515 Emerald Plaza College Station, Texas 77845-1515 Telephone- (979) 694-7000 Facsimile - (979) 694-8000
Respondent	
Texas A&M University System Texas A&M University	Brad McClellan ASSISTANT ATTORNEY GENERAL Tort Litigation Division P:O Box. 12548 Austin, Texas 78711- 2548

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III. Do. Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the united States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose? 10

IV. Do Chapter 502 and 503 of the Texas Labor Code withstand Strict scrutiny under the United States and Texas Constitution? 11

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STATEMENT OF THE CASE

On August 25, 19981 Michael Richards fried suit against the Texas A&M University System and Texas A&M University (collectively, "A&M ") in the 361st District Court of Brazos County, Texas. Specifically, Richards alleged that A&M violated the anti-retaliation provisions of the Texas Workers' Compensation Act by firing him for filing a workers' Compensation claim. Before trial, Judge Steve Smith granted A&M's Motion to Dismiss for Want of Jurisdiction based on sovereign immunity and dismissed Richards' suit. Richards noticed his appeal on May 30, 2001.

In the Tenth Court of Appeals, Richards was the Appellant, and the Texas A&M University System and Texas A&M University responded as the Appellees. On February 11, 2004, the Court of Appeals issued an unpublished Opinion authored by Chief Justice Tom Gray joined by JustiCe Felipe Reyna. Justice Bill Vance filed a concurring.opinion. The Court of Appeal s affirmed the Trial Court's dismissal of the case. On March 10, 2004, the Court of Appeals denied Richards' Motion for Rehearing in a letter ruling, noting that Justice Vance Would grant the rehearing and.issue hiS concurring opinion as that of the Court.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over Richards' appeal because the case involves a constitutional challenge to the validity of a statute that is necessary to the determination of the Case. Further, the Court of Appeals has committed an error of law of such importance to file State's.jurisprudence that it Should be corrected.

ISSUES PRESENTED FOR REVIEW

I. Does a state have a legitimate state purpose if that purpose violatesthe state's public policy as declared by the legislature?

II. Does theAppellees' proffered legitimate state purpose 0f saving the state money violate public policy, as deciared by the Texas legislature, when the legislature's scheme eviscerates, the Texas Workers' Compensation Act with regardto employees of Texas A&M and the University of Texas Systems?

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IV Do Chapter 502 and 503 of the Texas Labor Code withstand strict scrutiny under the United States and Texas Constitution?

A. Was race a motivating factor to the Texas legislature in enacting Chapter 502 and 503 when these statutes have a disparate impact on minorities?

B. Are Chapter 502 and 503 narrowly tailored to further a compelling state interest?

STATEMENT OF FACTS

Richards Was employed as a maintenance worker for A&M and suffered an on-the-job injury, in early 1998: I C.R. 13. On April 3, 1998, A&M fired Richards in .retaliation for filing a.workers' compensation claim. I C.R. 13-14.

Consequently, Richards filed suit against A&M under the anti-retaliation provisions of the. Texas Workers' Compensation Act. I C.R. 2:5. Before trial, Judge Steve Smith granted A&M's Motion to Dismiss for Want of Jurisdiction based on and dismissed Richards' suit. II C.R. 248-51. Richards noticed his appeal on May 30, 2001. II C.R. 263.

In the Tenth Court of Appeals, Richards was the Appellant, and the Texas A&M University System and Texas A&M .University responded to Richards' appeal as the Appellees. On February 11, 2004, the Court of Appeals issued anunpublished opinion authored by Chief Justice Tom Gray joined by Justice Felipe Reyna. Justice Bill Vance filed a concurring opinion. Tab 1. The Court of Appeals aff'umed the Trial Court's dismissal of the case. Tab. 1. on March 10, 2004, the Court of Appeals denied Richards' Motion for Rehearing ina letter ruling. Tab2. In denying Richards' MotiOn for Rehearing, the Court of Appeals noted that Justice Vance would grant the rehearing and issue his concurring opinion as that of the Court: Tab 2.

The Court of Appeals Correctly identified Richards' challengeto Chapters 502 and 503 of the Texas Labor Code as based on the Equal Protection Clause of the United States and Texas Cons6tutions. The Court's opinion, however,

misapprehends the nature of his Equal Protection challenge. Justice Gray holds that saving the State money is a rational basis to justify ttie statutes' discriminatory effects. Tab .1., p. 13. Rather, Richards contends that saving the state money is not a *legitimate governmental purpose* when it violates public policy as announced by the Texas Legislature in the Workers' Compensation Act

SUMMARY OF THE ARGUMENT

The Texas Workers Compensation Act implements the legislature's public policy of providing prompt remuneration to injured workers. The Act's anti-retaliation provisions are vital to its purpose, because, without them, employers can fire employees Who file claims and face no. consequences. Injured employees would hesitate to file Claims for benefits, in fear of being fired. Indeed, a right unprotected is no right at all.

But the legislature has refused to protect the fights of employees of the Texas A&M University System and University of Texas System ("UT System"), because the state has retained sovereign immunity, against the anti-retaliation claims of these two groups while waiving sovereign immunity, as to all other state agencies. On their face, these statutes implicate the Equal Protection Clause of the United States and Texas Constitutions. Surprisingly, the Court of Appeals Cited only one state purpose in upholding the Statutes: save the state money.

However, this purpose, to save the state money, in this context is not a legitimate purpose because it violates the Act's legislatively announced public policy of providing

injured workers with prompt remuneration. Without the protection of Act's anti-retaliation provisions, injured workers at the A&M and UT Systems may avoid the threat of being fired by Simply Choosing to not make: a: Worker's Compensation claim and go uncompensated. Thus, the impact of the Court of Appeals' decision is that literally thousands of state employees in these two University Systems are singled out and denied an effective remedy for their work-related injuries.

Furthennore, racial discrimination was an apparent motivating factor behind the anti-retaliation protection from its workers' compensation scheme for legislature deleting the A&M and UT Systems. Not only does the Act burden a group of workers who are disproportionately minorities, but the legislature enshrined a discriminatory System that was in place for over twenty years. Therefore, the Act must also meet the strict scrutiny to comply with the Equal Protection Clause. Nonetheless, the Act fails Such strict scrutiny.

This Court should exercise. its discretion to review Richards' case, because the impact of the Court of Appeals' decision is of Such importance to the state's jurisprudence that it should be corrected. As a further basis for the Court's jurisdictitm, Richards has challenged the validity of Chapters 502 and 503 of the Texas Labor Code based on the Equal Protection Clause of the United States and Texas Constitutions. Accordingly, Richards respectfully asks this Court review the Court of Appeals' decision.

ARGUMENT AND AUTHORITIES

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

Courts have long recognized that not all state purposes are legitimate state purposes are critical,because the very purpose of the Equal Protection Clause of the United States and Texas Constitutions is to protect citizens from arbitrary distinctions in the law. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (U. S. CONST. amend. XIV, §1); *Avery v. Midland County*, 390 U.S. 474, 484 (1968); *Whitworth v. Bynum,* 699 S.W.2d 194, 197 n.5 (Tex. 1985) (noting that the Equal Protection Clause of the Texas Constitution, TEX. CONST. art. I, § 3, is usually interpreted consistently with the United States Constitution). If Courts were blind to the capriciousness of certain legislative purposes, then the Equal Projection. clause would be empty. The United States Supreme Court, however, has recognized some, boundaries beyond which a state legislature' s purpose is no longer legitimate. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421,423 (1952). Specifically, a state purpose, is not legitimate if that purpose violates a constitutional provision or conflicts with federal law. *Id.*

Besides the. boundaries recognized by the United States Supreme Court, the legislature's purpose is illegitimate when that purpose violates a legislatively announced public policy. If a state could violateits own public policy, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law. *Olech*, 528 U.S. at 564; *Avery*, 390 U.S. at 484. For example, the

State of Texas could choose to save money by excepting the A&M and UT Systems from the Texas Whistleblower Act, TEX. GOV'T CODE § 554.001, et seq. If this were the case, if an employee of the A&M or UT Systems rported an illegal activity, the A&M and UT Systems could retaliate against a reporting employee by firing the employee, and the employee would have no remedy despite the Whistleblower Act's legislatively approved public policy of preventing Such retaliation because the Sovereign Immunity of the State of Texas would be pleaded to defeat every claim, just as was done in the case at bar. Clearly in this example, the state legislature's purpose would be arbitrary, even if the legislature's purpose did not contravene the constittution or a federal statute.

The Texas Whistleblower Act's goal in protecting reporting employees from retaliation is wholly analogous to the case at bar. As described in the example above, it is the retaliation for making a Whisfleblower report that is protected. Without this protection against retaliation an employee would likely be hesitant to make a Whistleblower report, and some reports would, of course, not be made at all. If our legislature dared to exempt A&M and UT System employees from the Texas Whistleblower Act's protections because it would save the State of Texas money, which it most certainly would, there would be a great outcry because there simply is no legitimate purpose for such a distinction between similarly situated employees. While money could and would be saved by failing to protect all such employees from this kind 0f retaliation, there is no rational support for such.an illegitimate distinction. The legislature's power to distinguish between similarly situated employees is not unbridled. Any effort by the legislature.to make distinction s between similarly situated employees must not only have a basis, but that

result must be a rational basis founded in a legitimate governmental purpose.

The Equal Protection Clause clearly imposes limits On the. "legitimate purposes" a state can claim to justify treating similarly situated employees differently. This Court can not give legitimacy to a legislative purpose that illegitimately violates a public policy that has been announced by the state legislature. In the case at bar, just like in the Whistleblower example above, without the protection against retaliation for filing a workers' compensation claim, claims will go unreported for fear the employee will lose his or her job. There-is no legitimate purpose behind a legislative attempt to deny protection to A&M and UT System employees from retaliation for filing for workers' compensation benefits.

Richards' Petition for Review invites this Court to render an opinion that imposes a meaningful limit on the legitimate state purposes which justify making distractions between smfilarly-situated state employees: Thus, Richards asks this Courtto exercise its jurisdiction to hear cases involving constitutional issues. TEX. R. APp. P. 56. l(a)(4). Unless this Court Seizes the opportumty to clarify its interpretation of the Equal Protection Clause of the United States and Texas Constitutions, the Texas Legislature will be emboldened to create more arbitrary and harmful distinctions based on illegitimate state purposes that Contravene legislatively announced public policy. Today, this Court can ensure that the legislature appreciates the true limits of its authority under the United States attd Texas Constitutions.

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public Policy, as declared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers Compensation Act with regard to employees of Texas A&M and the University of Texas Systems?

The Texas legislature has' given all public (except as noted below) and private employees a remedy when their employer retaliates against them for filing a workers' compensation claim. Chapters 501 to 505 of the Labor Code govern the waiver of sovereign immunity for state agencies regarding the Workers' Compensation Act. But the. legislature has denied that remedy to employees of the A&M and UT Systems. TEX: LABOR CODE §§ 502.001 - 502.070; §§ 503.001 - 5031071: Specifically, the legislature did not list Chapter 451, the anti-retaliation provisions, among the Act's provisions for which the state waives its Sovereign immunity as to the A&M and UT Systems. §§ 502.002, 503.002. To justify the legislature's distinction, the Court of Appeals found a single legitimate state purpose: to save the state money.[1] Tab-1. p. 12-13.

The fact remains that this state purpose, saving the state money, violates the public policy of Texas; as announced by the state legislature in the Texas Workers' Compensation Act. § 40i.001 *et. seq*. The Act's overarching purpose is to ensure that employees who are injured on the job receive Prompt remuncration. *Paradissis v. Royal*

[1]Curiously, the Court of AppealS doubted whether A&M fires its employees for filing workers' compensation claims. TAB 1. p. 13. But no one will never know that A&M retaliates against its employees, so long as Richards cannot go forward with his case!

Indemnity Co., 507 S.W.2d 526, 529 (Tex. 1974). In most cases, the Act is an injured employecs exclusive remedy for work-related injuries. §408.001(a). Given that an employee often has a remedy only under the Act, the legislature recognized that employers could escape workers' compensation liability by retaliating harshly against employees who filed workers' compensation claims, because workers wonld be discouraged from pursuing clams. *See Trico Technologies, Corp. v. Montiel*; 949 S.W.2d 308, 312 (Tex. 1997); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362; 367 (Tex. App.-El Paso 2002, no pet.). Thus, the legislature has declared that the anti-retaliation provisions of the Act are critical to supporting the public policy of providing injured workers with prompt remuneration.

Stripped of the Act's protections against retaliation, injured employees of the A&M and UT Systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation claim. This fear of retaliation will create a *chilling effect*, as fewer and fewer injured workers take advantage of the prompt remuneration provided by workers' compensation. If one injured worker chooses to suffer with untreated and/or uncompensated injuries rather than risk losing his or her job for filing a claim, that is one worker too many. Because of the Court of Appeals' ruling, the A&M and UT Systems may, in effect, save the state some money because their injured employees will not want to risk filing workers' compensation claims and risk losing their jobs. The Texas Legislature's Scheme to deny injured employees at their flag ship institutions the protection against retaliation for filing Workers' compensation claims may be a money maker for our State; but the Cost of "saving" this money is too high and has no legitimate purpose.

The Court of Appeals has found that saving money is our legislature's sole rational basis for excluding A&M and UT. System employees from the anti-retaliation protection of the Workers' Compensation Act. But, in this limited Context, Richards contends that saving money is not a legitimate legislative purpose. The Equal Protection Clause can not be interpreted to allow A&M and UT System employees to be stripped of their right to be protected when filing workers' compensation claims, while all other private and public employees enjoy this protection. If the Court stands idly by today, and fails to recognize this complained of action as being an illegitimate purpose, what other arbitrary violations of public policy will the Court tolerate? It is not too far a stretch of the imagination to think that, in the example cited herein, the legislature might next abrogate the rights of A&M and UT System employees by taking away their right to be protected, from retaliation when making Whistleblower reports. A legislature's power to make such arbitrary distinctions between similarly situated employees is not unbridled. The Equal Protection Clause does not require that there be just "some basis" for a distinction between Similarly situated employees, but that the distinction is a,"rational basis" Supported by a legitimate purpose. The legislature has no legitimate purpose here because violating state policy, as created by the legislature, can never be a legitimate purpose to support such a distinction.

The Court of Appeals cites *Clark v. Univ. of Tex. Health Science Cir.*; 919 S.W.2d 185, 188 (Tex. App. - Eastland 1996, writ denied) in an effort to follow its Sister Court which upheld Chapter 503 from an Equal Protection challenge. Tab 1., p. 12: However, the Eastland Court's decision is bad law. While discussing the Equal Protection

Clause, the Eastland Court applied a Due Process analysis. Specifically, the Eastland Court held that Clark did not have a property interest. *Id.* at 188. However, lack of a property interest is relevant to a Procedural Due Process analysis, not an Equal Protection Clause analysis. *Am. Mfr. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59(1999). The fact that a published Appellate Court decision misapplies the law in deciding this issue, underscores the need for the Supreme Court to speak on this point.

The truth of the matter is that the question before this Court is not academic endeavor-the rights of thousands of state employees in the A&M and UTSystems hang upon the Constitutional guarantees that this Court finds in the Equal Protection Clause. In short, this question is of such importance to the State's jurisprudence that it begs to be addressed.

Chapters 502 and 503 eviscerate theWorkers' Compensation Act as to employees of the A&M and UT Systems, and the only state interest that can be advanced in defense of these statutes is that they will save the state money. But this purpose violates the public policy announced in the Workers' Compensation Act which is to provide injured employees with prompt remuneration. *See Paradissis*, 507 S.W.2d at 529. In effect, the Court of Appeals has giventhe State a free hand to single out certain State employees to hire them, hurt them, and then summarily fire them when they seek the compensation for their injuries to which all other workers are entitled. Accordingly, this Court should refuse to recognize that Saving the state money alone is a legitimate state interest to deny workers in the A&M and UT Systems the protections given to all other workers in the State of Texas.

III. Do Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate.state purpose?

Under the United States and Texas Constitutions, a state statute Survives rational basis scrutiny onlywhen the statute is rationally related:to a legitimate state purpose. *Bd of T'r. of the Univ. of Ala. v. Garrett*, 531 U.S: 356, 367 (2001); Whitworth, 699 S.W.2d at 197. Here, the Appellees have failed to articulate a legitimate state purpose, because saving the state money alone is not a legitimate purpose. Therefore, Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause ofthe United States and Texas Constitutions.

Thus, the Validity of these statutes is Squarely before this Court, Clearly, cases involving the validity of statutes are within this Court's jurisdiction. TEX. R. APP. P. 56.l:(a)(3). In light of this issue's importance to the rights of thousands of employees of the A&M and UT Systems,this Court should not hesitate to exercise its authority to review Richards' case.

IV. Do chapter 502 and 503 of the Texas Labor Code withstand strict scrutiny under the United States and Texas Constitution?

A. Was race a motivating factor to the Texas legislature in enacting Chapter 502 and 5103 when these statutes have a disparate impact on minorities?

In stark contrast to rational-basis review, courts give little deference to a legislature when a statute distinguishes between similarly-situated individuals based on race. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct, 2325, 2338 (2003). Even.though a statute does not make racial distinctions on its face, courts will apply strict scrutiny if racial discrimination was a motivating factor in the legislature's dccision-making. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 u.S. 252, 265-66 (1977). The United States Supreme Court has established a framework for determining whether racial discrimination was a motivating factor. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471,489 (1997). An important Starting point is whether the statute has a disproportionate impact on minorities. *Id.* Further, a court should consuler the historical background of the legislatures decision, the specific sequence of events leading up to the challenged decision, any departures from the normal procedural sequence, and the statute's legislative history. *Id.*

As described above, Chapter 502 and 503 effectively strip workers in the A&M and UT Systems of their rights to seek prompt remuneration for workplace injuries. For this reason alone, these statutes violate the Equal Protection Clause, but there is more. The legislature's decision to place this heavy burden On workers at the A&M and UT Systems was racially motivated. The statutes' effects and the circumstances surrounding their enactment lead to the conclusion that racial discrimination was a motivating factor to the Texas legislature that enacted these statutes.

The fact that Chapter 502 and 503, have a disparate impact on racial minorities is an "important starting point." *Reno*, 520 U.S. at 489. Racial minorities make up a dispro-

portionately large number of the less educated labor pool that feeds jobs requiring manual labor.[2] People who work in jobs that require manual labor, in turn, will more frequently suffer job related injuries. [3] Therefore, the Workers Compensation Act has its largest impact in compensating work related injuries as to jobs that require manual labor, which are more disproportionately held by racial minorities. In other words, racial minorities make up a disproportionate number of the group of workers who most need prompt remuneration for their injuries and ultimately rely on the Workers' Compensation System. But the legislature chose not to protect this specific group from retaliation under Chapter 451, effectively• stripping them of the fight to prompt remuneration, because to seek prompt remuneration would put their jobs in jeopardy, with no protection.

Moreover, the legislature chose to simply leave in place a discriminatory scheme of Workers' compensation benefits that had been m place for over twenty years. Since the enactment of the Act's antirretaliation provisions, workers at the A&M and UT Systems have been defiled the protection against retaliation that is critical to the Act's legislatively-announced public policy. In 1971, the legislature enacted the anti-retaliation provisions as Vernon's Civil

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[2]U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 383, 385(122nd ed. 2002)(discussing minorities in manual labor)

[3]*Id.* at 406, 408 (discussing higher injury rates and costs related to jobs requiring manual labor); Anne C. Case & Angus Deaton, Broken Down by Work and Sex: How Our Health Declines (July 2003) (on file with the National Bureau of Economic Research at http://papers.nber.orglpapers/W9821)

Statute, Article 8307c– later codified as Chapter 451. Before the legislature enacted Chapter 501 as the general compensation scheme for state employees, Article 8309g, § 15 covered most state employees. Like Chapter 501, Article 8309g allowed most state employees to sue the state under the Act's anti-retaliation provisions. The predecessors of Chapter 502 and 503, however, denied workers at the A&M and UT Systems the right to sue under the anti-retaliation provisions. Specifically. Article 8309b, § 7 applied to workers at the A&M System, while Article 8309d, § ;/applied to workers atthe LIT System. Thus, the legislature endorsed a legislative scheme that was rooted in historical discrimination, even though the scheme has a disparate impact on,racial minorities.

Accordingly, race was a motivating factor when the legislature enacted Chapter 502 and 503. *Reno*, 520 U.S. at 489. And these statutes violate the Equal Protection Clause of the United States and Texas Constitutions, unless they survive strict scrutiny. *Grutter*, 123 S. Ct. at 2338

B. Are Chapter: 502 and 503 narrowly tailored to further a compelling state iterest?

Chapter 502 and 503 distinguish between similarly-situated individuals based on race, so strict scrutiny applies. Thus, these Statutes are Constitutional only if they are narrowly tailored to further a compelling governmental intetest. *Id.* at 2337-38. As the statutes cannot even survive rational-basis scrutiny, they cannot satisfy strict scrutiny.

The State has failed to articulate a rational basis for these statutes, much less a Compelling governmental interest. In fact, the State's only asserted interest to justify these

discriminatory statutes is to save the state money. A state interest is compelling only if the State show's that: (1) the State actually enacted the statute based on the interest; and (2) a strong evidentiary basis supports the interest. *Shaw v. Hunt,* 517 U.S. 899, 908 n.4 (1996). Here, the State has produced no evidence to show that saving the state money is a compelling state interest. In fact the State of Texas never even proffered this reason at the trial: Court or before the Appellate court. Instead, it was clear that the legislature did not rely on thus justification when enacting Chapter 502 and 503, because the Court of Appeals invented this reason to support the statutes. Tab 1, p. 12-13. Also, there is no indication of an unbearable financial strain on the State's treasury. Finally, as the sole analysis saving the state money alone has never been recognized as a compelling governmental interest.

Besides lacking a compelling governmental interest, Chapter 502 and 503 are not narrowly tailored. To be narrowly tailored, the State's means must be specifically and narrowly tailored to accomplish the compelling governmental purpose. *Grutter*, 123 S. Ct. at 2341. Of course, depriving A&M and UT System workers the fight to stie for retaliation will save money as to retaliation claims, as the State argues. But the effects of Chapter 502 and 503 are not limited to retaliation claims. As described above, these statutes create a chilling effect, thus discouraging injured workers at the A&M and UT Systems from even filing workers' compensation claims at all: Where the State intended to save money as to retaliation claims, the State has also created a ruse that saves the state moneyas to all workers' compensation claims by A&M and UT System workers. Thus, Chapter 502 and 503 are not narrowly tailored, rather their effects are

sweeping and far reaching.

Because Chapter 502 and 503 fail strict scrutiny, they violate the Equal Protection Clause of the United States and Texas Constitutions.

PRAYER

Michael Richards respectfully requests that this Court reverse the Tenth Court of Appeals' panel decision issued on February 11, 2004. Specifically, Richards requests that this Court reverse the Trial Court and fmd that Chapter 502 and 503 of the. Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because they fail to provide protection against retaliation for filing a workers' compensation claim, a protection granted all other State employees. Richards further asks that sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings that are consistent with this Court's opinion.

Respectfully submitted,
WEST, WEBB, ALLBRITTON,
GENTRY & RIFE, P.C.
By: /s/ Gaines West

Gaines West
State Bar No. 21197500
Alan M. Bush
STATE BAR NO. 24040614
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile

ATTORNEY FOR PETITIONER

CERTIFICATE.OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by overnight delivery to the following on this the 23rd day of April, 2004.

Brad McClellan
ASSISTANT ATTORNEY GENERAL
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

APPENDIX I

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

June 25, 2004

Mr. Gaines West
West Webb Allbritton & Gentry, P.C.
1515 Emerald Plaza
College Station, TX
77845-1515

Mr. Bradley Dean McClellan
Assistant Attorney General
P. O. Box 12548
Austin, TX 78711-2548

RE: Case Number: 04-0387
Court of Appeals Number:
10-01-00183-CV
Trial Court Number: 47,822-361

Style: MICHAEL RICHARDS
V.
TEXAS A&M UNIVERSITY SYSTEM AND
TEXAS A&M UNIVERSITY

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Sincerely,
/s/ Andrew Weber
Andrew Weber, Clerk
by Claudia Jenks,
Chief Deputy Clerk

co: MS. Sharri Roessler
Mr. Jerry Deere

APPENDIX J

V.T.C.A., Labor Code § 502.002

C
VERNON'S TEXAS STATUTES AND CODES ANNOTATED
Vernon's Texas Statutes and Codes Annotated
Currentness
LABOR CODE
Labor Code (Refs & Annos)
TITLE 5. WORKERS' COMPENSATION
Title 5. Workers' Compensation
SUBTITLE C. WORKERS' COMPENSATION INSURANCE COVERAGE FOR CERTAIN GOVERNMENT EMPLOYEES
Subtitle C. Workers' Compensation Insurance Coverage for Certain Government Employees
CHAPTER 502. WORKERS' COMPENSATION INSURANCE COVERAGE FOR EMPLOYEES OF THE TEXAS A&M UNIVERSITY SYSTEM
Chapter 502. Workers' Compensation Insurance Coverage for Employees of the Texas a&M University System
SUBCHAPTER A. GENERAL PROVISIONS
Subchapter A. General Provisions
→§ 502.002. Application of General Workers' Compensation Laws; Limit on Actions and Damages

(a) The following provisions of Subtitle A apply to and are included in this chapter except to the extent that they are inconsistent with this chapter:

(1) Chapter 401, other than Section 401.012 defining "employee";
(2) Chapter 402;
(3) Chapter 403, other than Sections 403.001-403.005;
(4) Chapter 405;
(5) Sections 406.031-406.033; Subehapter D, Chapter 406; [FN1] Sections 406.092 and 406.093;
(6) Chapter 408, other then Sections 408.001(b) and (c);
(7) Chapters 409 and 410;
(8) Subchapters A and G, Chapter 411, [FN2] other than Sections 411.003 and 411.004; and
(9) Chapters 412-417.

(b) For the purpose of applying the provisions listed by Subsection (a) to this chapter, "employer" means "the V.T.C.A., Labor Code § 502.002 institution."

(c) Neither this chapter nor Subtitle A authorizes a cause of action or damages against the system or arty institution or employee of the system or institution beyond the actions and damages authorized by Chapter 101, Civil Practice and Remedies Code.

CREDIT(S)
Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

[FNI] V.T.C.A., Labor Code § 406.07l et seq.

[FN2] V.T.C.A., Labor Code § 411.001 et seq., and § 411.091 et seq.

V. T. C. A., Labor Code § 502.002, **TX LABOR § 502.002**
END OF DOCUMENT

APPENDIX K

V.T.C.A., Labor Code § 502.002

C
VERNON'S TEXAS STATUTES AND CODES ANNOTATED
Vernon's Texas Statutes and Codes Annotated
Currentness
LABOR CODE
Labor Code (Refs & Annos)
TITLE 5. WORKERS' COMPENSATION
Title 5. Workers' Compensation
SUBTITLE C. WORKERS' COMPENSATION INSURANCE COVERAGE FOR CERTAIN GOVERNMENT EMPLOYEES
Subtitle C. Workers' Compensation Insurance Coverage for Certain Government Employees
CHAPTER 502. WORKERS' COMPENSATION INSURANCE COVERAGE FOR EMPLOYEES OF THE TEXAS A&M UNIVERSITY SYSTEM
Chapter 502. Workers' Compensation Insurance Coverage for Employees of the Texas a&M University System
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(5) Sections 406.031-406.033; Subehapter D, Chapter 406; [FN1] Sections 406.092 and 406.093;
(6) Chapter 408, other then Sections 408.001(b) and (c);
(7) Chapters 409 and 410;
(8) Subchapters A and G, Chapter 411, [FN2] other than Sections 411.003 and 411.004; and
(9) Chapters 412-417.

(b) For the purpose of applying the provisions listed by Subsection (a) to this chapter, "employer" means "the V.T.C.A., Labor Code § 502.002 institution."

(c) Neither this chapter nor Subtitle A authorizes a cause of action or damages against the system or arty institution or employee of the system or institution beyond the actions and damages authorized by Chapter 101, Civil Practice and Remedies Code.

CREDIT(S)
Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

[FNI] V.T.C.A., Labor Code § 406.071 et seq.

[FN2] V.T.C.A., Labor Code § 411.001 et seq., and § 411.091 et seq.

V. T. C. A., Labor Code § 503.002, **TX LABOR § 503.002**
END OF DOCUMENT